Debbie Reynolds Hotel, Inc. *and* International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 720, AFL–CIO. Cases 28–CA–14127 and 28–RC–5468

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On September 18, 1997, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. We agree with the judge's conclusion that the Respondent violated Section 8(a)(1) by President Todd Fisher's December 11, 1996[2] statements to employees that the Respondent would probably have to shut down some productions and move them and the equipment to California, that low-budget producers would not be able to afford the facilities, and that in the worst case he would have to shut down. These unlawful statements are distinguishable from the employer's remarks found lawful in *Action Mining*, 318 NLRB 652, 657 (1995). In that case, unlike here, the Board found that there was some factual basis for the employer's statements concerning the potential loss of customers. The Board also found that the employer's statements about the possible effects of unionization, including potential customer loss, would not reasonably be perceived by employees as implicitly threatening that the employer might take action on its own initiative, without respect to economic necessity. In the context of the present case, we find that employees would reasonably understand Fisher's statements to imply such a threat.

2. We adopt the judge's recommendation that a *Gissel*[3] bargaining order be issued to remedy the Respondent's unfair labor practices. In *Gissel*, the Supreme Court held that the Board has the authority to issue bargaining orders in two categories of cases, cases "marked by 'outrageous' and 'pervasive' unfair labor practices" (category I), and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (category II).[4] The Court found that, in determining a remedy in category II cases,

> the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.[5]

In agreeing with the judge that a *Gissel* category II bargaining order is the appropriate remedy in this case, we follow our analysis in *M. J. Metal Products*, 328 NLRB 1184 (1999). We have, as mandated by the Supreme Court in *Gissel*, examined the extensiveness of the Respondent's unfair labor practices and the likelihood of their recurrence in the future. We conclude, for the reasons set forth below, that the Respondent's unlawful conduct renders a fair second election unlikely, and that the "employees' wishes are better gauged by an old card majority than by a new election."[6]

Even before the Union filed the representation petition on November 15, the Respondent embarked on a campaign of coercive actions to undermine the employees' support for the Union. Thus, in October Production Manager Henry Cutrona interrogated employee Guilkey concerning her involvement with the Union and whether

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's determination that Jean Guilkey is not a supervisor, we note that the judge implicitly credited Guilkey's testimony that her recommendation that employees be selected for layoff on the basis of seniority was not effective.

We find, in agreement with the judge, that employee Johnny Ford had a reasonable expectation of reemployment, and thus was eligible to vote in the election. In so finding, we rely on Entertainment Director Joseph Bianchi's statement that he would be doing "call backs." We do not rely on Ford's discussion with President Todd Fisher about the availability of the electrician position formerly held by Mike Deasy, because that position was not included in the bargaining unit.

In agreeing with the judge's recommendation to sustain the Respondent's challenge to the ballot of Joey Mele, we note that no exception was filed to the judge's finding that Mele is a supervisor.

[2] All dates are 1996 unless otherwise indicated.

[3] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[4] Id. at 613–614.

[5] Id. at 614-615.

[6] *M. J. Metal Products*, supra, quoting *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996).

other employees had been talking to the Union. In addition, he threatened Guilkey that Fisher would never permit the employees to continue union activity or to unionize the hotel, and would fire the employees and close the hotel if they tried.

The Respondent intensified its efforts as soon as the Union filed its petition and demanded recognition. On that very day, Supervisor Mele threatened employee Sullivan that if the Respondent found out who was involved with the Union, they "were out of here"; interrogated Guilkey about the Union; and threatened her by relating that Cutrona had said that Fisher was angry and that anyone responsible for the union organizing would be fired. The following Monday, November 18, the Respondent replaced the locks to the showroom, for which the employees had previously been issued keys, and announced that the employees would be laid off as of November 30. Two days later, the Respondent's former president, Henry Ricci, then a consultant, conducted a counseling session with Michael Brister in which he solicited Brister's grievances concerning problems at the hotel, though stating that the problems would not be remedied, and threatened negative consequences of unionization, including job loss, citing a unionized hotel where the employees were all fired after they demanded a raise.

Ten days later, and 2 weeks before the election, the Respondent laid off most of the stage and museum employees and subcontracted the unit work for subsequent shows to the shows' producers. As a further reprisal against active and known union supporters Brister and Guilkey, Entertainment Director Joseph Bianchi pressured the producers not to hire them, thereby effectively transforming their layoffs into discharges. Bianchi candidly testified that he took this action against Guilkey because she had been disloyal to the Respondent by engaging in union activity. About the same time, President Fisher informed employee Wilson that he was bringing work into the hotel, but that, if the employees selected the Union, he could not support the hotel and the Respondent would go elsewhere. In a meeting of employees on December 11, 2 days before the election, Fisher threatened a reduction in work, discharge, and the closing of the hotel if the employees voted for the Union.

The election was held on December 13, with inconclusive results. On December 16, Fisher called Wilson into his office, told her that several employees had given him statements about promises that the Union had made to employees, and instructed her to provide such a statement by the end of the day.

As the above events clearly demonstrate, the Respondent took drastic, immediate, and persistent measures to thwart its employees' support for the Union in the representation election. This unlawful course of conduct began even before the petition was filed and escalated quickly after the filing. It reached its peak with the commission of several "hallmark" violations, including subcontracting out most of the unit work and laying off most of the unit employees, discharging Brister and Guilkey, and repeatedly threatening job loss and closing, and continued even after the election. "Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity."[7] In view of the severity and unitwide scope of the Respondent's actions, as well as the small size of the unit, comprising 13 employees who work in close proximity to one another, the Respondent's unlawful conduct would predictably have a severe and lasting coercive effect on each unit employee.[8]

This coercion was underscored by the involvement of high-management officials, including Fisher. Not only were unlawful threats by other management officials attributed to Fisher, but he also personally and repeatedly threatened employees that the hotel would close if it became unionized. In addition, he coerced Wilson after the election to provide him a statement about promises by the Union. Production Manager Cutrona, who subsequently became the Respondent's chief operating officer, interrogated Guilkey and, as related by Mele, threatened that the employees responsible for the union activity would be discharged. At the time of the layoff, Entertainment Director Bianchi insisted that producers not hire Brister and Guilkey. Finally, all three of these officials were involved in the planning of the layoff itself. "When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[9]

The Respondent's campaign of antiunion conduct demonstrated to employees in the clearest possible terms the Respondent's willingness to take drastic and unlawful action in order to prevent them from obtaining union representation. Such persistent and highly coercive actions indicate an increased likelihood that the Respondent will resort to such measures in response to future union campaigns. Moreover, they leave a long-lasting

[7] *Consec Security*, 325 NLRB 453, 454 (1998), enfd. 185 F.3d 862 (3d Cir. 1999).

[8] *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 107–108 (D.C. Cir. 2000), enfg. in relevant part 328 NLRB 1058 (1999) (court enforced *Gissel* bargaining order in light of magnitude of respondent's unfair labor practices, small size of unit, and involvement of respondent's owners).

[9] *Consec Security*, supra, at 454–455. See *Electro-Voice*, 320 NLRB 1094, 1096 (1996); and *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995).

impression on employees and cause them to be especially reluctant to risk another period of unemployment, or a permanent loss of their jobs, by engaging in further union activities. Therefore, we conclude that a *Gissel* bargaining order is necessary to effectuate the policies of the Act.

In deciding that a bargaining order is warranted in this case, as required by some circuit courts, we have considered its appropriateness at the present time and the inadequacy of other remedies. As the Board discussed in *M. J. Metal Products* in response to concerns raised by the District of Columbia Circuit regarding *Gissel* bargaining orders, the Supreme Court in *Gissel* found that a bargaining order both remedies the effects of the unlawful election conduct and deters future unlawful conduct.[10] The Court further recognized that in some cases, the employer's violations so damage the election process that no additional unlawful conduct is necessary to restrain employees from freely exercising their rights in a new election. In the circumstances of the present case, as described above, we find that the Board's traditional reinstatement and backpay remedies are inadequate to erase the coercive effects of the Respondent's unlawful conduct so that employees may freely express their desires in a second election.[11]

Moreover, we have considered the protection of the Section 7 rights of all bargaining unit employees. The *Gissel* Court found that a bargaining order in such cases protects the rights of employees who favored representation, as demonstrated by prior majority support. However, because the order only establishes a bargaining relationship for a reasonable period, after which a decertification petition can be filed, the Court reasoned that the order does not unduly prejudice the rights of employees who prefer another union or no union as their representative. Having considered the interests of employees who support and oppose the union, the Court concluded that when "the employer's unfair labor practices have the tendency to undermine a union's majority strength and destroy election conditions, then 'the only fair way to effectuate employee rights' is to issue a bargaining order."[12]

Accordingly, for all of the reasons discussed above, we conclude that a *Gissel* bargaining order is a necessary and appropriate remedy in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Debbie Reynolds Hotel, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that Case 28–RC–5468 be severed from Case 28–CA–14127, and that it is remanded to the Regional Director for Region 28 for action consistent with this decision, as set out in the recommended Order of the administrative law judge.

Nathan W. Albright, Esq. and *Scott Feldman, Esq*., for the General Counsel.

Norman H. Kirshman, Esq. and *Roger Grandgenett, Esq*., for the Respondent/Employer.

William Sokol, Esq. and *Brian Stedman,* for the Union/Petitioner.

DECISION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Las Vegas, Nevada, on May 28–29 and July 1–2, 1997.[1] The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 720, AFL–CIO (the Union or Petitioner), has charged that Debbie Reynolds Hotel, Inc. (the Respondent or Employer) has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

In a related representation case, Case 28–RC–5468, the Regional Director ordered that a hearing on the challenged ballots of Jean Guilkey, Henry Cutrona, Christi Rivers, Perry Wolf, Keith Alfeiri, Johnny Ford, and Joey Mele be consolidated for hearing with the unfair labor practice case. Additionally, objections filed by the Petitioner and the Employer to the December 13, 1996 election were consolidated with this hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. BACKGROUND

The Respondent operates a hotel, including a showroom and museum, in Las Vegas, Nevada. The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a

[10] 328 NLRB 1058, 1059 (1999).

[11] We note further that, as in *M. J. Metal Products*, the Respondent has not asserted that a *Gissel* bargaining order is inappropriate because of changed circumstances, including the passage of time or turnover among unit employees or management officials. The District of Columbia Circuit found in *Charlotte Amphitheater* that the respondent bears the burden of bringing such changed circumstances to the attention of the Board, and the Board has no duty to inquire whether the passage of time or turnover may have diminished the effects of the prior unfair labor practices or the need for a bargaining order. 82 F.3d at 1080.

[12] *M. J. Metal Products*, supra, 1186, quoting *Gissel*, 395 U.S. at 612.

[1] All subsequent dates refer to 1996 unless otherwise stated.

labor organization within the meaning of Section 2(5) of the Act.

In September Respondent's employees Jean Guilkey, Michael Brister, and several other employees discussed the desirability of being represented by the Union. Guilkey and Brister then met with Union Representative Brian Stedman. Some union meetings followed at which employees signed cards authorizing the Union to be their collective-bargaining representative. The Union filed its representation petition on Friday, November 15 and also sent a letter to the Respondent demanding recognition and bargaining on behalf of the unit employees. As of that date the Union possessed nine cards from the following employees: Keith Alfeiri, Michael Brister, Fabio Rossetti Bush, Marco Rossetti Bush, Jean Guilkey, Kirk A. Robbins, Lolly E. Senibaldi, Daniel T. Sullivan, and Jackie P. Wilson.

The following Monday, November 18, the unit employees were notified they were to be laid off effective November 30 and the showroom work was to be subcontracted. The Respondent refused to recognize the Union and a stipulated representation election was held on December 13.[2] The results of the election showed that approximately 18 voters cast 6 votes for representation and 5 against representation. There were seven determinative challenged votes. As noted above, both the Employer and Petitioner also filed objections to the election. Certain alleged unfair labor practices, challenges, objections, and the Union's majority depend on the employment status of the following individuals.

A. Jean Guilkey

The Respondent alleges Guilkey is a supervisor. She was hired in September 1995 as a stagehand to work in the Respondent's showroom. Her work consisted mainly of operating a spotlight and video for shows. She also assisted Stage Manager Jim Carey in such matters as typing work schedules and memos pursuant to his direction and filling out comp slips for him to sign and authorize.

In approximately April 1996, Supervisor Carey left the Respondent's employment and Henry Cutrona was placed in charge of the showroom with the title production manager. He designated Guilkey as assistant production manager. As Cutrona's assistant Guilkey continued doing her stage duties, as well as such tasks as typing schedules, handing out pay checks, turning in employees' hours for payment, and placing orders for stage materials. At Cutrona's direction she typed a list of responsibilities of the showroom personnel. This list designated several personnel that employees were to look to for, "projects, job descriptions, scheduling, complaints, problems, and any other questions." (GC Exh. 49.) Guilkey was not one of the designated leaders. Ordering of materials was a routine task that involved showroom personnel placing their needs on an order board. Guilkey or employee Michael Brister would call in the orders. Guilkey would type up schedules but this was a routine task which she credibly testified was directed by Cutrona.

On one occasion Guilkey gave her opinion of who should be retained when the Respondent was laying off employees. This occasion occurred in June 1996. In sum, I find the credited evidence shows that Cutrona told Guilkey to make a list of the employees that were eligible for layoff. They discussed employee Katie Douglas whom Cutrona wanted laid off but he could not do that if they went by seniority. Guilkey said she thought seniority should be used in determining layoffs and in that case Douglas should not be laid off. A meeting with upper management to discuss the layoffs was then held. Present in this meeting were President Todd Fisher, Entertainment Director Joseph Bianchi, Cutrona, and Guilkey. They discussed the personnel and Guilkey stated her opinion. Katie Douglas was laid off. I find that Guilkey's opinions were considered in making the layoff decisions but were not the final determinant.

Guilkey was placed on the *Excelsior* voter eligibility list by the Respondent and served as the Union's observer at the election. When Guilkey was laid off by the Respondent on November 30 Respondent's personnel records showed she was classified as "Showroom Crew." The Respondent subsequently filed an election objection alleging that Guilkey is a supervisor and that she should not have been the Union's election observer. As noted, Guilkey's vote in the election was also challenged.

The burden of proving that an individual is a supervisor is on the party alleging that supervisory status exists. *Health Care Corp.,* 306 NLRB 63 fn. 1 (1992). I find that Guilkey's duties were of a routine and clerical nature not requiring the exercise of independent judgment. The Respondent has not met its burden of showing that Guilkey was a supervisor within the meaning of Section 2(11) of the Act. I find that Guilkey was a statutory employee, entitled to engage in protected union and concerted activity, vote in the representation election, and to serve as union election observer. I recommend that the challenge to Guilkey's ballot be dismissed and her vote counted.

B. Keith Alfeiri

Keith Alfeiri signed his union authorization card on November 13 and he was discharged on November 22. He voted in the December 13 election, and his vote was challenged by the Respondent. I find that Alfeiri's card should be counted in determining the Union's majority status at the time of its November 15 demand for recognition. Additionally, I find that Alfeiri had been discharged at the time of the December 13 election, and that he had no reasonable expectation of employment after his discharge. I therefore recommend that the challenge to Alfeiri's ballot be sustained.

C. Joey Mele

The Respondent challenged the vote of Joey Mele. Mele was alleged in the Government's complaint to be a supervisor within the definition of Section 2(11) of the Act. The Respondent admits his supervisory status at all material times. The Petitioner offered no contrary evidence. I find that Joey Mele was a statutory supervisor and was not eligible to vote in the election. I recommend the challenge to Mele's ballot is sustained.

[2] The unit is: All lighting, sound, and stage technicians, spotlight operators, museum control operators, audio-visual engineers and technicians, and wardrobe attendants employed by the Employer at its Las Vegas, Nevada location; excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act, as amended.

Mele also participated in union activity during the Union's organizational campaign. Mele signed a union authorization card and attended one or two union meetings. The Government does not rely on Mele's card to support its argument that the Union was the majority representative of the unit employees. At one of the meetings Mele attended the union representatives learned of his supervisory status. Mele was asked to leave and immediately did so. There was no evidence that Mele solicited any employee to sign authorization cards or that any card signer was coerced into signing a card by Mele or anyone else. Mele was not the instigator of the union movement as that role was taken by Guilkey and Brister. Mele did not testify at the hearing. I find that Mele's participation in the union campaign was peripheral and insufficient to taint the Union's showing of interest, other employees' authorization cards for determining majority status or the election results. *A.P.R.A. Fuel Oil*, 309 NLRB 480, 498–499 (1992); *Cal-Western Transport*, 283 NLRB 453 (1987); and *Moe Warehouse & Accessory*, 275 NLRB 1132, 1142 (1985).

D. Henry Cutrona

Henry Cutrona is the Respondent's showroom production manager and an admitted supervisor within the meaning of the Act. (Respondent's fourth amended answer.) The Respondent placed his name on the *Excelsior* voting list as an eligible voter, he voted in the election and his ballot was challenged by the Union. As Cutrona is an admitted supervisor, I find that he was ineligible to vote in the election and the challenge to his ballot should be sustained.

E. Christi Rivers

Christi Rivers is the girlfriend of Respondent's president, Todd Fisher. Her name was on the eligibility list, she voted in the election and her ballot was challenged by the Union. The Respondent concedes that Rivers did not do any unit work and that she was not eligible to vote in the election. It is recommended that the challenge to Christi Rivers' ballot be sustained.

F. Perry Wolf

Perry Wolf worked for the Respondent primarily as a janitor. His name was on the *Excelsior* list, he voted in the election and his vote was challenged by the Union. Wolf did not testify at the hearing. His duties were generally to do cleanup work which included the Respondent's museum and showroom. One witness remembered that Wolf would regularly work an average of 2 hours in the morning and 2 in the afternoon cleaning up for shows in the stage area. He generally did not work during shows. Wolf would occasionally assist in the showroom area. He also would drive the Employer's truck and trailer as required including some out-of-state trips to pick up costumes for museum displays. I find that Wolf was primarily a janitorial employee with little community of interest to the operators, technicians, and wardrobe attendants included in the unit description. I recommend the challenge to the ballot of Perry Wolf be sustained.

G. Daniel Yuen

Employee Daniel Yuen's name was included on the *Excelsior* list, but he apparently did not vote in the election. He worked under Wolf and the record as a whole establishes that Yuen did janitorial work. I find that Yuen does not have a community of interest with unit employees and that he should not be counted in determining the Union's majority representative status in the appropriate unit.

H. Johnny Ford

The Employer challenged the ballot of Johnny Ford, asserting he had been terminated and had no reasonable expectation of reemployment. On November 15, 1996, Ford was told by electrician Mike Deasy that he had been "fired" and to see Joe Bianchi. Bianchi told him he was laid off for lack of work. Bianchi also told Ford that he would be doing some "call backs" at the beginning of the year. He gave Ford a copy of his layoff slip which stated the reason for termination as lack of work. Ford was not subsequently called to return to work. Bianchi denied that he ever promised Ford any future employment but did not refute Ford's version of their conversation.

A few days before the election on December 13, Ford had a conversation with a coworker who told him that electrician Mike Deasy had quit. Ford telephoned Fisher and asked if Deasy's job was open. Fisher said Deasy had quit and asked him if he was interested in the position. Ford said he was. Fisher said he would get back to Ford after the election, "cause he needs to know what's going on with the election." Ford never heard from Fisher. Fisher did not deny this conversation.

I find that Bianchi's statement that he would be doing some "call backs" at the start of the year was an indication that Ford might be reemployed by the Respondent. Fisher's inquiry of Ford as to his interest in Deasy's job and that he would get back to him after the election was another indication of some interest in employing Ford in the future. Finally, the Respondent did not distinguish as to why Ford had any less expectation of reemployment than others who were also laid off and voted without challenge. I find that based on the objective facts Ford had at least a reasonable expectation of future employment sufficient to allow him to vote in the election. *Hughes Christensen Co.,* 317 NLRB 633 (1995). I recommend the challenge to Johnny Ford's ballot be overruled.

I. Other Employees

The names of the following individuals also appeared on the Excelsior voter eligibility list and their status of inclusion or exclusion in the unit must be considered in determining the number of employees in the unit in order to ascertain the Union's majority status.

Mike Deasy was the Respondent's electrician. He was directly supervised by president, Todd Fisher, who set his schedule. Unit personnel were supervised by other management members. Deasy's name did not appear on any unit schedules that were introduced into evidence. Part of Deasy's duties were to do maintenance work in the showroom and museum. His work shop was located in a different area of the hotel from both the museum and showroom. There was some nonspecific testimony that Deasy would on occasion fill in for stage crew members. The regularity and time spent in this substitution as well as his time spent doing work for the showroom and museum were not established. Deasy was not laid off with the museum

and stage employees who were let go on November 30. He voted without challenge in the election. Deasy did not testify at the hearing. I find that there is inadequate evidence to conclude that Deasy had a sufficient community of interest with the unit work to be included in determining the Union's majority status.

Armando Gobbato was the Respondent's carpenter. He voted without challenge in the election. Gobbato was directly supervised by Fisher. His carpenter shop is located separately from the stage and museum areas. Gobbato occasionally worked on stage sets and other needs of the museum and showroom. The time he spent on these tasks and the regularity of such work was not established. He was not scheduled for work as part of the showroom or museum crew. I find that Gobbato's connection to unit work was not shown to be regular and that he should not be included in the unit for purposes of determining the Union's majority status.

The parties entered into a stipulation during the hearing that Randy Hendrickson is a supervisor and that his name should be stricken from the eligibility list. Hendrickson is, therefore, not considered part of the unit.

Carolyn and Heather MacMullen were showroom wardrobe employees that had been terminated in June 1996. Their names were included on the *Excelsior* voting list, but neither apparently voted in the election. Carolyn, returned sometime in 1997 to work with the Debbie Reynolds Show as part of Reynolds crew. As Reynolds's son, Fisher, testified, Carolyn MacMullen, "comes and goes with Debbie's show." I find that the MacMullens were not part of the unit because they had no reasonable expectation of employment with the Respondent hotel and had not worked for the Respondent for approximately 5 months before the election. I, therefore, do not include either of the MacMullens in assessing the Union's majority status.

None of the other employees listed on the *Excelsior* voting list (GC Exh. 9) were contested by any party and I include those additional employees in calculating the Union's majority status.

II. SUMMARY OF CHALLENGES AND UNIT COMPOSITION

In summary, it is recommended the challenges to the ballots of Henry Cutrona, Christi Rivers, Perry Wolf, Keith Alfeiri, and Joey Mele be sustained. It is further recommended that the challenges to the ballots of Jean Guilkey and Johnny Ford be overruled.

In light of the above-noted resolutions of employee status, I find that at the time of the Union's November 15 demand for recognition the appropriate unit was composed of 13 employees. On November 15 the Union possessed nine valid authorization cards, including Keith Alfeiri's card. I find that the Union's majority representative status was demonstrated by these valid authorization cards.

III. UNFAIR LABOR PRACTICES

A. Cutrona's October Encounter with Guilkey

Guilkey testified that in October Cutrona approached her at work and asked if she had any involvement with the Union. Guilkey admitted she had. Cutrona inquired if the crew had been talking to the Union about organizing and that he knew that about half of the crew had some kind of involvement with the union. Guilkey told him the crew was concerned about their working conditions. Cutrona told her that Todd Fisher would never allow employees to continue their union activity or permit them to make the hotel a union house. Guilkey protested that the employees had the legal right to organize if they chose. Cutrona replied that would never happen on the property, that Todd Fisher had not allowed it to happen with the engineers previously, that Fisher would never allow a union on the property and that if the employees tried to organize the Respondent would close the showroom and fire them all. Cutrona denied ever discussing unions with Guilkey. Considering the demeanor of the witnesses, Guilkey's detailed recitation of the conversation, and the record as a whole, I credit Guilkey's testimony. I find that Cutrona's interrogation and threats are a violation of Section 8(a)(1) of the Act.[3]

B. Events of November 15

1. Union's demand for recognition

On November 15 the Union filed its representation election petition with the Board and also sent a letter to the Respondent demanding recognition and bargaining. The Respondent has at all times refused to recognize and bargain with the Union.

2. Mele's threats to Sullivan

Employee Daniel Sullivan testified that on November 15 he was in the office area with Supervisor Joey Mele when Cutrona came in and asked to speak privately with Mele. The two men went to another office and talked for several minutes. Mele then returned to where Sullivan was sitting. Mele told Sullivan that Cutrona had just told him he "knew that there was an organizing campaign going on for the Union, and that if they found out who it was that was involved. . . they were out of there." Sullivan replied that this was what he expected from the Respondent. Mele did not testify and the Respondent asserts that he was a union supporter and thus did not bind the Respondent by such statements. Cutrona denied ever making such a statement to Mele. I found Sullivan to be a truthful witness whose demeanor impressed me as a person accurately relating what he heard and observed. While the evidence supports the contention that Mele had prounion feelings, that does not detract from his threatening statement to an employee. I find that supervisor Mele's uncontroverted threat to Sullivan that the Respondent would get rid of anyone who supported the Union is a violation of Section 8(a)(1) of the Act.

3. Mele's threats to Guilkey

Jean Guilkey testified that on November 15 when she arrived at work she also had a conversation with Mele. Mele told her that he had talked earlier in the day with Cutrona. Mele recited that Cutrona said the Respondent had just been notified of the Union's election petition and asked if Mele knew anything about the matter. Mele declined to answer the question. Mele related that Cutrona said Fisher was angry and that anyone that

[3] Guilkey also related similar conversations with Cutrona on earlier occasions. These credited conversations were not alleged as unfair labor practices in the complaint but reflect Respondent's animus towards unions.

was responsible for organizing the Union would be fired. I find Mele's uncontroverted threat to Guilkey is a violation of Section 8(a)(1) of the Act.

C. Events of November 18

1. Respondent changes the showroom locks

When unit employees arrived at work on Monday, November 18, they found that they no longer had independent access to their work locations because the locks had been changed. In contrast to past practice, the employees were not provided new keys. The locks had only been changed in the showroom and museum areas. This same day the Respondent announced to the unit employees that they were being laid off at the end of the month. The Respondent justifies its changing of the locks as a means to lessen thefts that had been occurring at the hotel. The testimony shows that certain items had been taken from the hotel but the timing of the lock change to these events was not satisfactorily defined. The timing of the lock change to the announcement that same day of the layoffs and the Union's demand for bargaining is significant. I find, based on the timing of the change, the Respondent's other unlawful conduct, and its unsatisfactory explanation of the need to change the selected locks, that the Respondent made the change to harass the unit employees. The Respondent violated Section 8(a)(1) of the Act by such harassment.

2. Counseling of Brister

On November 15 Michael Brister had been working the light board for a show. Bianchi came in while the show was running and asked Brister if one of the lights was out of place. Brister admitted saying a light was out and "flippantly" telling Bianchi that he would love to fix it for him but he had not paid yet. Bianchi made no response to Brister's comment.

On November 18 Brister was called to a meeting with Bianchi, Henry Ricci, Respondent's former president and then a consultant to the Respondent, and Judy DeCarlo, Respondent's Security Chief. Ricci recited what had happened regarding Brister's refusal to replace the light and his remarks to Bianchi. Brister said he had been joking and that he had forgotten to fix the light. Brister was told there was going to be a layoff of everyone on the crew and that he could either be laid off for cause because of the incident or for lack of work like everyone else. Ricci said the meeting was to determine which course of action to take. Brister said he had been joking and apologized. The supervisors discussed the matter outside Brister's presence and then told him they thought he was salvageable but needed to work on his attitude. Therefore he was directed to attend two counseling sessions with Ricci.

The Government alleges the November 18 meeting was intended to direct Brister to counseling where he would be dissuaded from engaging in union activities. I find that the Respondent had cause to discipline Brister because of his November 15 remarks to Bianchi. I find that the Respondent did not violate the Act by having this meeting with Brister.

3. Announcement of layoff

Also on November 18 the Respondent called a meeting of unit employees. They were told that they would be laid off effective as of November 30. The employees were told that the Respondent was working on an agreement for shows to work the hotel under a subcontracting arrangement, and, if the shows agreed, the employees would be working directly for them in November. It was also discussed that Debbie Reynolds would be appearing in a New Year's Eve show at the hotel and that they could work for that show. Additionally, it was announced that things would continue as normal in January under the Respondent's plans.

D. Brister's November 20 Counseling

On November 20 Brister attended a counseling session with Ricci. Ricci asked Brister what problems he had noticed at the hotel. Brister cited some examples and Ricci brought up the subject of unions. Ricci said people unionize because they are angry and are treated badly and the solution to that was for management to correct the problems. When Brister asked Ricci when the problems at Respondent's hotel were going to be corrected, Ricci said they were not. Ricci cited another hotel as an example of the bad things that could happen with union representation. He noted that all the employees at that hotel had been laid off when they demanded a raise. Ricci told Brister that he had been involved in union negotiations in the past. He said when he first was employed by the Respondent, the maids were trying to organize and he had counseled them as well.

Brister said he believed that union representation could correct some of the problems between management and employees. Ricci said that he did not feel that was true and the employees did not need union representation. Ricci told Brister that what had been said was strictly confidential and he was not to mention it to anybody. Ricci stated that if any other employees were confused about these sorts of issues that Brister could tell them that they could come in and counsel with him anytime they wanted. Brister said he would pass along the message. Ricci said he could see that Brister was not going to be a problem anymore and he did not need to return for any more counseling. Ricci did not testify at the hearing.

Ricci's "counseling" session with Brister was shown to have been used by the Respondent to subtly threaten Brister that union representation would have adverse results to the employees. Ricci also suggested that the antidote for union representation was for management to correct problems. Ricci's remarks about union employees losing their jobs had particular resonance when considered in relation to already announced layoff of the unit employees and Respondent's other unlawful conduct. I find that under all the circumstances the Respondent's counseling session of November 20 was a threat to employees and a solicitation of grievances in violation of Section 8(a)(1) of the Act.

E. Layoff and Subcontracting of Unit Work

The Respondent laid off most of the stage and museum employees, including Guilkey and Brister, on November 30. Some of these employees worked on subsequent shows for subcontractors. The Government alleges that Brister and Guilkey were effectively discharged as of November 30 and other employees were laid off because of their union activities. The Respondent denies the employees protected activities had anything to do with the layoffs. It is further alleged that the unilateral an-

nouncement and implementation of the subcontracting were violations of Section 8(a)(1) and (5) of the Act.

When the employees were laid off each was given a personnel form that stated the reason was "lack of work." Shows, however, continued to be performed at the showroom. The Kenny Kerr Show played the hotel starting December 1. Fisher testified that this show was contracted for on the basis of a "four wall agreement." He explained this type of contract meant the independent producer of the show took the financial risk and arranged all of the crew, etc., to run the show. The hotel then was mainly renting the room to the show producer. On December 10 the Respondent reaffirmed its subcontracting intent when it announced in a memo to employees that it was further subcontracting unit work to T. D. Productions (the Debbie Reynolds Show). Shows continued to be produced at the hotel at the time of the hearing in this case. No specific evidence was offered of how the layoffs and subcontracting were financially beneficial to the Respondent.

In December the production manager for the Kenny Kerr Show, Strutt Hurley, hired the Respondent's crew to work on that production. This included Guilkey and Brister. Hurley testified that the first part of December she had a conversation with Bianchi. He told her he had a personal problem with Mike Brister, and that he did not want him in the building. Hurley protested that not having Brister made it difficult for her as she needed him to program the lighting. Bianchi told Hurley to call Fisher and discuss the matter with him. Hurley telephoned Fisher and explained the problem. Fisher said they could work something out. Hurley suggested that she needed Brister until a replacement could be hired. Fisher said that she could use Brister for the time being and they would discuss it later. Brister continued to work for Hurley until the Kenny Kerr show temporarily stopped at the end of December and was replaced by the Debbie Reynolds Show. Jean Guilkey also worked the entire Kenny Kerr Show in December. Hurley testified both employees performed their work well.

The unit employees were notified in the December 10 memo from Bianchi that the Debbie Reynolds' Show would be appearing on New Year's Eve and again in February. The memo stated the productions would be four wall agreements and if any employee was interested in working the shows they should let Bianchi know of their interest in working "as subcontract labor." Bianchi noted that he was acting as Debbie Reynolds' agent in that she had asked him to assemble a crew. (GC Exh. 5.) Brister and Guilkey expressed interest in working the shows but neither was hired.

The Kenny Kerr Show started at Respondent's showroom again in January. Hurley hired both Brister and Guilkey to again work the show. Before they started work Bianchi spoke to Hurley about employing these two individuals. He told her that he did not want Brister or Guilkey on the property as there was a conflict with them. Hurley was concerned because she needed qualified employees. Bianchi said the Respondent had replacements they wanted her to use. Hurley testified she did not have any choice but to refuse to employ Guilkey and Brister because of Bianchi's orders. Thus neither individual worked at the hotel thereafter.

1. Guilkey and Brister

Bianchi testified that the reason he did not want Brister back was a complaint Brister had made to management that he had seen Bianchi using cocaine. The charge was investigated by the Respondent and found to be unsubstantiated. Bianchi testified the reason he did not want Guilkey back was because he considered she had been disloyal to the Respondent by becoming involved in union activity:

> Q. Now, did you ever tell Strutt Hurley that you'd prefer that she didn't hire Jean Guilkey?
>
> A. [Bianchi] Yes.
>
> . . . .
>
> Q. Okay. And what motivated you to do that?
>
> A. Jean Guilkey was a member of the management team and had violated the company trust.
>
> Q. By doing what?
>
> A. Organizing for the union.
>
> . . . .
>
> Q. Okay. So you were, in effect, retaliating against Jean Guilkey for her union activities. Correct?
>
> A. I didn't feel it as a retaliation, but—
>
> Q. That's what motivated you?
>
> A. I think what motivated me was that this was an employee who was a member of the management team, trusted and violated our trust.

[Tr. 624–625.]

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); and *Manno Electric***,** 321 NLRB 278 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The Government has met its *Wright Line* burden of showing union activity, knowledge, timing, and animus. Brister was an obvious union supporter who wore a union badge while at work. Brister told Bianchi in their "counseling" session he thought the Union could help the employees. Cutrona's remarks to Guilkey in October, cited above, show employer knowledge. In that conversation Cutrona said that he knew about half of the crew had some kind of involvement with the Union. Guilkey was known to the Respondent for her union support having

been interrogated by Cutrona as early as October about her interest in the Union. Most significant, the Respondent admits that its refusal to allow her to be hired at the hotel after the layoff was due to her "violation of trust" for having engaged in union activity. The timing of the subcontracting, the layoff, threats, interrogations, and the efforts to ban Brister and Guilkey from work on the Respondent's premises, all followed in short order after the commencement of the Union's organizing campaign and demand for recognition. Finally, it is apparent from the Respondent's actions, both before and after the layoff, that it vehemently opposed union organization and undertook its own campaign of unlawful conduct to combat the Union. I, therefore, find that Respondent's union animus has likewise been established.

It is apparent that Brister had incurred the wrath of Bianchi for reporting his alleged cocaine use. The Respondent, however, never told Brister that he could not return to work for this reason. Brister helped instigate the union movement at the hotel. He talked to other employees about the Union and signed an authorization card. Brister wore union insignia on his hat or on his shirt lapel in front of management personnel. Brister boldly told Ricci that he had been talking to union people and thought that the Union could correct some of the employees' problems. As a chief union supporter, Brister was a candidate for fulfilling Fisher's threats that he would never allow the Union to represent the employees and would fire anyone who supported the Union. I find that the Government has proven by a preponderance of the evidence that Brister was singled out, at least in part, because of his union activities for discharge. The Respondent has not overcome that showing. I conclude that Brister was effectively fired by the Respondent on November 30 when he was laid off because the Respondent did not want him on the premises thereafter. I find that Brister's discharge is a violation of Section 8(a)(1) and (3) of the Act.

As already noted, Guilkey is found to be an employee within the definition of the Act. The Respondent admitted she was persona non grata for work on the hotel premises. The Respondent offered a single reason for its action against Guilkey— her disloyalty to the Respondent by engaging in union activity. I find that the Respondent's discharge of Guilkey is also a violation of Section 8(a)(1) and (3) of the Act.

Finally, the Government has shown that the Respondent carried out its threats to do away with unit work if the employees engaged in union activity. The Respondent immediately after notification of the Union's bargaining demand announced the layoff of unit employees and the subcontracting of work. In light of Respondent's widespread threats of repercussions that would follow union activity and the timing of the action, I find that the Respondent discriminatorily subcontracted the unit work. *NLRB v. Rain-Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984). Even after the subcontracting the Respondent asserted much control. Thus, Bianchi told Hurley the employees he did not want her to hire. Bianchi's memo of December 10 states that he is acting as agent for the subcontractor Debbie Reynolds in arranging employment for her show. (GC Exh. 5.) In sum, I find that the Respondent sought to use the subcontracting, at least in part, as a subterfuge to punish the unit employees for their union activity, to assure that the unit work would be done nonunion, to control who would ultimately work at the hotel, and to avoid having to deal with the Union. I find the discriminatory announcement and implementation of the subcontracting of unit work, with the accompanying layoffs, were a violation of Section 8(a)(1) and (3) of the Act.

2. The refusal to bargain and bargaining order

The Government asserts that the only appropriate remedy for the Respondent's unfair labor practices is a bargaining order. The Supreme Court held in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), "[If] the Board finds that the possibility of erasing the effects of past [unfair labor] practices and ensuring a fair election (or fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." See *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1171 (D.C. Cir. 1993). I find this standard is appropriately applied in this case. The Respondent's threats of discharge, threats to cease and move unit work, the discharges of Guilkey and Brister, and the discriminatory and unilateral subcontracting of work with accompanying layoffs are all "hallmark" violations that justify the invocation of a bargaining order remedy. *Laser Tool, Inc.,* 320 NLRB 105 fn. 2 (1995); *Taylor Machine Products,* 317 NLRB 1187 (1995); and *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992). These unlawful actions were accomplished by high-management officials who are still in command of the Respondent's business operations. *Be-Lo Stores*, 318 NLRB 1, 15 (1995); and *Somerset Welding & Steel*, 304 NLRB 32–34 (1991). The discriminatory subcontracting of work affected each of the unit employees and is continuing. The unlawful discharges of Brister and Guilkey had a further chilling effect on the union support in this small unit of employees. The effect of such widespread and serious unfair labor practices is not easily abated by traditional remedies and the passage of time. The Union has established through its authorization cards that it was the majority representative of the employees. I shall, therefore, order a bargaining remedy which will date from the Union's November 15 demand for recognition. *Trading Port, Inc.,* 219 NLRB 298, 301 (1975).

Subsequent to the Union's November 15 demand date the Respondent announced and implemented unilaterally the subcontracting of the unit work. The Respondent also unilaterally laid off the unit employees. I find such actions are also an unlawful refusal to recognize and bargain with the Union and violations of Section 8(a)(1) and (5) of the Act.

F. Ford's Inquiry About Work

As related above, in early December, employee Johnny Ford telephoned Todd Fisher to discuss the availability of electrician Mike Deasy's job. Fisher confirmed that Deasy had quit and asked Ford if he was interested in the position. Ford said he was and Fisher told him he would get back to him about the matter after the election because he needed to know what was going on with the election. Ford never heard from Fisher. The Government alleges that this conversation was a promise of benefit to Ford. While I have concluded above that the conversation was an indication that Fisher would consider Ford for employment, I find that Fisher's comments did not rise to the level of

an unlawful promise of benefit. I find that Fisher's remarks to Ford did not violate Section 8(a)(1) of the Act.

G. Fisher's Discussion of Future Work

In early December employee Jackie Wilson was present in Todd Fisher's office with Cutrona and Fisher. Fisher told Wilson that he was going to call all employees into his office to have a private meeting. He stated that he was bringing work into the hotel but he would not be able to do that if the employees selected the Union to represent them. Fisher said the Respondent would go elsewhere and he did not feel he would be able to support the hotel if the employees voted for the Union. I find that Fisher's threats were additional unlawful violations of Section 8(a)(1) of the Act.

H. Fisher's December 11 Employee Meeting

On December 11 Fisher held a meeting with the unit employees. Several employees testified as to what he said, but Fisher did not testify concerning his remarks. In sum, Fisher told the employees that union organization could be very detrimental to the hotel because of its financial condition. He told the employees he would probably have to shut down some productions and move them and the equipment to California. Fisher warned that low budget producers would not be able to afford the use of Respondent's facilities if the Union represented them. He told the employees that in the worst case scenario he would have to close the showroom.

In assessing whether an employer's statements to employees are threats or permissible opinions or predictions reasonably based on fact, the statements are examined in the totality of the relevant circumstances. *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969); and *Action Mining*, 318 NLRB 652, 654 (1995) (The context of statements can supply meaning to otherwise "ambiguous or misleading expression if considered in isolation.) The context of Fisher's statements is twofold. First, is the unquestionably poor financial condition of the Respondent's business. The Respondent filed for Chapter 11 bankruptcy protection the day after the close of the hearing.[4] Second, is the background of Respondent's unlawful conduct, including threats that employees would be discharged if they engaged in union activities, threats the Respondent would never permit a union to represent the unit employees, threats to close the showroom and the unlawful subcontracting, discharges, and layoff of employees. Fisher's statements reaffirmed the Respondent's extant unlawful conduct concerning union activities. On balance, I find that Fisher's expressions were thinly veiled unlawful threats of reduced work, implied discharge and the closing of the showroom consonant with Respondent's other illegal conduct. I find that Fisher's remarks are violative of Section 8(a)(1) of the Act. *Harrison Steel Castings Co.,* 293 NLRB 1158–1159 (1989) (Statement concerning loss of business found to be an unlawful threat pursuant to an assessment of all relevant circumstances, including the employer's other unlawful conduct.)

[4] United States Bankruptcy Court, District of Nevada, Case BK–S–97–25089.

I. Fisher's Interrogation of Wilson

On December 13 the inconclusive representation election was held. Employee Jackie Wilson testified that on December 16 she was called into Todd Fisher's office. Fisher told her that the Union had made promises to employees and several people had given him statements stating what the Union had promised them. Fisher told her that she needed to write a statement saying what the Union had promised her and give it to him before the end of the day. Wilson told him the Union had not promised her anything concerning the Respondent's operations. Wilson submitted the statement to the Respondent and it was introduced into evidence from Respondent's files. Fisher admitted talking to Wilson about the Union in December but denied that he asked her to give him a written statement about union promises. I found Wilson to be a credible witness whose testimony was corroborated by the Respondent's files. I do not credit Fisher's denial that he told Wilson to prepare a statement. I find Fisher's interrogation of Wilson as to what had been promised her by the Union is an unlawful interrogation that violates Section 8(a)(1) of the Act.

IV. OBJECTIONS TO THE ELECTION

A. Respondent's Objections

The Respondent filed the following numbered objections to the election:

1. *Prior to the election the Union promised voters that the Union would obtain jobs for them through the Union's hiring hall if the Union won the election and thereafter offered jobs to certain voters.* Evidence was introduced that the Union had told some employees they could get referrals to other employment through the Union's hiring hall. I find that these representations are recitations of the advantages of registering for work through the hiring hall. The same is true of any ensuing offers of work. I find these actions are not objectionable conduct. It is recommended that the Employer's objection 1 be overruled.

2. *Prior to the election the Union promised a discount on union membership fees if the Union won the election.* I find that there is no credible evidence to support Employer's Objection 2. I recommend that objection 2 be overruled.

3. *The Union's designated election observer was a supervisor within the meaning of the Act.* The Employer's Objection 3 relates to the fact that Guilkey served as the Union's observer at the December 13 election. As Guilkey is found to be an employee within the definition of the Act, I recommend that the Employer's Objection 3 be overruled. In sum, I find that the Respondent's objections to the election are without merit.

B. Petitioner's Objections

As fully set forth below in the Order, certain challenges to the election are to be counted and, regardless of the outcome of the count, a bargaining order is to be imposed against the Respondent. Therefore, it is not necessary to rule on the Union's objections to the election. However, should any reviewing authority disagree with my conclusion that a bargaining order is essential to remedy the unfair labor practices found in this case,

I do make the following findings regarding the Petitioner's numbered objections.[5]

1. *The Employer placed the names of several ineligible voters on the Excelsior list.* As noted above several ineligible persons were named on the *Excelsior* voting list. The Union did not question the content of the list prior to the election. The Board does not mechanically apply the *Excelsior* list requirements. *Telonic Instruments*, 173 NLRB 588 (1969). The Board does not, however, intend that an employer is vested with unlimited discretion regarding the content of the list. *Ponce Television Corp.*, 192 NLRB 115, 116 (1971). In considering the possible adverse effect that the expanded list may have had in this case, I conclude that this action was not so prejudicial as to warrant setting aside the election. I, therefore, recommend that Petitioner's Objection 1 be overruled.

2. *The Employer intimidated eligible voters by threatening the loss of employment.* As found above, the Respondent on several occasions threatened unit employees with loss of employment if they engaged in union activity or selected the Union as their representative. I recommend that Petitioner's Objection 2 be sustained.

3. *The Employer made promises of benefit.* I have found that the Respondent did not unlawfully make promises of benefits to employees. I recommend that Petitioner's Objection 3 be overruled.

4. *The Employer publicly insulted and incited union supporters.* I find that there is no substantial credible evidence to support this Petitioner's objection. I recommend that Petitioner's Objection 4 be overruled.

5. *The Employer made material misrepresentations concerning the Union.* I find that there is no substantial credible evidence to support this Petitioner's objection. I recommend that Petitioner's Objection 5 be overruled.

6. *The Employer threatened to close the facility and/or take retaliatory measures if the Union won the election.* The Respondent has been found to have unlawfully threatened to close the showroom and move work and equipment to California. Additionally, the Respondent has been found to have threatened the discharge of employees for engaging in union activity. I recommend that Petitioner's Objection 6 be sustained.

CONCLUSIONS OF LAW

1. Debbie Reynolds Hotel, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 720, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for collective-bargaining purposes:

> All lighting, sound, and stage technicians, spotlight operators, museum control operators, audio-visual engineers and technicians, and wardrobe attendants employed by the Employer at its Las Vegas, Nevada location; excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act, as amended.

4. At all times since November 13, 1996, the Union has been, and is now the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent has violated Section 8(a)(1) and (3) of the Act.

6. By refusing to bargain with the Union since November 15, 1996, while engaging in a campaign of unfair labor practices that undermined the Union's majority status and impeded the election process, the Respondent violated Section 8(a)(1) and (5) of the Act.

7. A bargaining order is necessary to remedy the Respondent's unfair labor practices.

8. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not violated the Act except as specified.

10. The challenges to the ballots of Henry Cutrona, Christi Rivers, Keith Alfeiri, Perry Wolf, and Joey Mele, are sustained. The challenges to the ballots of Jean Guilkey and Johnny Ford are overruled.

11. The Employer's objections to the election are overruled. The Petitioner's Objections 2 and 6 are meritorious and constitute objectionable conduct affecting the results of the representation election held on December 13, 1996, in Case 28–RC–5468. All other Petitioner's objections are overruled.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist from this conduct.

The Respondent having discriminatorily discharged Jean Guilkey and Michael Brister and discriminatorily laid off unit employees it must offer them reinstatement to their former positions, without prejudice to their seniority or other rights and privileges, or if any such positions do not exist, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position, and to make them whole for any loss of earnings and other benefits they may have suffered, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, I shall order the Respondent to rescind its discriminatory and unilateral subcontracting of unit work.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[5] The Union did not file a brief or otherwise argue what specific evidence related to its objections.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Debbie Reynolds Hotel, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge, loss of work, or the closing of the facility because they engage in union activities.

(b) Threatening employees that the Respondent will not permit the Union to represent its employees.

(c) Interrogating employees concerning their union sympathies or activities.

(d) Harassing employees because of their union activities.

(e) Soliciting employees' grievances in order to undermine union activity.

(f) Discharging employees, discriminatorily subcontracting unit work, laying off employees, or otherwise discriminating against them in order to discourage union activities.

(g) Refusing to recognize and bargain with the Union as the collective-bargaining representative of the unit employees.

(h) Subcontracting unit work or laying off employees without notice to and bargaining with the Union.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(2) Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jean Guilkey, Michael Brister and any laid off unit employees, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jean Guilkey, Michael Brister, and any laid off unit employee, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Jean Guilkey and Michael Brister, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Recognize, and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All lighting, sound, and stage technicians, spotlight operators, museum control operators, audio-visual engineers and technicians, and wardrobe attendants employed by the Employer at its Las Vegas, Nevada location; excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act, as amended.

(f) Rescind any outstanding subcontracts for unit work.

(g) Within 14 days after service by the Region, post at its facilities in copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 3, 1997.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 28–RC–5468 be severed from Case 28–CA–14127, and remanded to the Regional Director for Region 28, that the ballots of Jean Guilkey and Johnny Ford be opened and counted by the Regional Director in accordance with the Board's Rules and Regulations, and that he prepare and serve on the parties a revised tally of ballots. If the revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. This certification of representation shall be in addition to the bargaining order. *A.P.R.A. Fuel Oil*, 309 NLRB 480, 482 (1992); and *Eddyleon Chocolate Co.,* 301 NLRB 887, 892 (1991). If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, vacate the proceedings in Case 28–RC–5468, and the bargaining order alone shall take effect. *Moe Warehouse & Accessory*, 275 NLRB 1132 fn. 1 (1985).

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees, discriminatorily subcontract their work, lay off employees or otherwise discriminate against them in order to discourage their support for the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 720, AFL–CIO or any other labor organization.

WE WILL NOT threaten employees with discharge, loss of work, or the closing of the facility because they engage in union activities.

WE WILL NOT threaten employees that we will not permit the Union to represent its employees.

WE WILL NOT interrogate employees concerning their union sympathies or activities.

WE WILL NOT harass employees because of their union activities.

WE WILL NOT solicit employees' grievances in order to undermine union activity.

WE WILL NOT refuse to recognize and bargain with the Union as the collective-bargaining representative of the unit employees.

WE WILL NOT subcontract unit work or lay off employees without notice to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize, and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All lighting, sound, and stage technicians, spotlight operators, museum control operators, audio-visual engineers and technicians, and wardrobe attendants employed by us at our Las Vegas, Nevada location; excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act, as amended.

WE WILL rescind any outstanding subcontracts for unit work.

WE WILL, within 14 days of the Board's Order, offer Jean Guilkey, Michael Brister, and any laid-off unit employees, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jean Guilkey, Michael Brister, and any laid-off unit employee, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jean Guilkey and Michael Brister, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

DEBBIE REYNOLDS HOTEL, INC.